

Agenda

Item #9



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members and Counsel
From: Jonathan Wayne, Executive Director
Date: June 20, 2008
Re: Use of the Term "Re-Elect"

At the May 30, 2008 meeting of the Ethics Commission, you voted to take up at your June 27 meeting the issue of whether candidates who are running for an office they do not currently hold (non-incumbents) should use the term re-elect in campaign signs or other communications.

Although I did not confer with Assistant Attorney General Phyllis Gardiner for purposes of writing this background memo, you may wish to ask for her view regarding how the Commission can address campaign communications perceived to be misleading while staying within First Amendment limitations.

Background

This issue arose because on May 13, 2008 legislative candidate Kenneth Lindell contacted the Commission's Assistant Director, Paul Lavin, by telephone and by e-mail. Mr. Lindell was a member of the 122nd Legislature who had been defeated for re-election in 2006. He explained that he had put out some old campaign signs that used the term "re-elect." He asked if there was any statute or rule restricting the use of the term to sitting incumbents. He also asked whether it was the opinion of the Commission that his use of the term was misleading.

Paul Lavin responded by telephone and in the attached e-mail. By telephone, Paul noted to Mr. Lindell that the term "re-elect" was usually used by incumbents but that there was nothing in the Election Law that prohibited Mr. Lindell from using the term in his campaign communications. He reiterated this last point in his e-mail response. He stated "[w]hether someone may find the term 're-elect' in the context of your current campaign misleading may be a possibility, but its use does not violate any law or rule found in Maine's Election Laws."

No complaint has been filed regarding Mr. Lindell's signs.

First Amendment Concerns

Underlying Paul's response was a sense of caution that the employees of the state's Ethics Commission or any state agency should not judge whether campaign speech is true or misleading, especially in the absence of any express statutory authority to do so. The

staff has taken this conservative approach in order to protect the Commission from being criticized for overstepping its authority by acting as a political truth squad. This view is the result of a number of considerations, including:

- On December 12, 2006, the members of the Ethics Commission declined to take action on a complaint filed against 2006 legislative candidate David Miramant alleging that Mr. Miramant's campaign mailings had misrepresented the voting record of his opponent. The Commission Chair at that time, Andrew Ketterer, commented that if a candidate misrepresents his opponent's voting record in a campaign mailing, the appropriate remedy is a political response by the other candidate, not a determination by the Commission that the campaign mailing violated the Code of Fair Campaign Practices.
- The staff is generally aware that statutes in other states forbidding false or misleading speech have been struck down as unconstitutional because they discourage or suppress political speech, which is traditionally subject to a high degree of constitutional scrutiny.
- In June 2006, the Commission found that a legislative candidate violated a provision in the Election Law (21-A M.R.S.A. § 1014-A) by using an endorsement in a primary election mailing that was not authorized by the two individuals purportedly making the endorsement (U.S. Senators Olympia Snowe and Susan Collins). In my view, that provision does not restrict the content of political speech, and merely preconditions a candidate's use of an endorsement on obtaining prior authorization of the endorser. The candidate obtained legal representation from the Maine Civil Liberties Union and filed a constitutional lawsuit against the Commission arguing that § 1014-A abridges candidates' rights of free speech. After a Superior Court decision affirming the Commission's determination, the lawsuit is on appeal to the Maine Supreme Judicial Court.

For these reasons, the Commission staff has presumed that the Commission members do not want us getting drawn into disputes about whether campaign speech is true or false. In addition to his awareness of the constitutional issue of state interference with political speech, the Commission's December 12, 2006 decision was in large part the reason why Paul did not directly answer Mr. Lindell's question about whether his use of the term "re-elect" was misleading.

May 30, 2008 Meeting of the Commission

At the May 30, 2008 meeting, Commission member Francis Marsano expressed disapproval of the staff's advice to Mr. Lindell. The discussion is summarized in pages 3-13 of the draft minutes submitted for your consideration as agenda item #1.

Mr. Marsano suggested that when the staff of the Commission responded to Mr. Lindell's question, it should have made reference to the Code of Fair Campaign Practices. The Code is a voluntary pledge of good campaign conduct that may be signed by legislative

and gubernatorial candidates and filed with the Commission. Mr. Lindell signed the Code on March 14, 2008 (attached).

Use of "Re-Elect" in Other 2008 Campaigns

Following the Commission's May 30, 2008 meeting, the staff received telephone calls regarding the campaigns of two current members of the State House of Representatives who are running for the State Senate. In both campaigns, the candidates have used signs from previous House campaigns with the term "re-elect," even though neither candidate has served in the Senate.

I notified you about one of the situations by e-mail on June 6, 2008 relating to signs of Rep. Troy Jackson in his race for Senate, District 35. On June 6, we received word from his primary election opponent that he would be filing a complaint by noon on that day. Later that day, he advised me that no complaint would be filed.

In the case of the other campaign (Rep. Jacqueline Lundeen, running for Senate District 34), I discussed the issue of the signs with the Representative and explained that the Commission would consider the use of the term "re-elect" at the June 27 meeting. She replied that a small number of signs had been used briefly and that part or all of the word re-elect had been covered. If you would like more information about either of the Senate campaigns, I would be pleased to provide it to you on June 27.

Notice to Interested Parties

On June 13, 2008, I mailed to the candidates in the three legislative districts a notice that you would be taking up this issue at your June 27 meeting. I also sent the notice to Daniel Dunkle, the editor of the Republican Journal, which published an article about the staff's advice to Mr. Lindell. The article is attached and includes a picture of one of Mr. Lindell's signs.

Handling Future Requests for Advice

The Commission staff responded to Mr. Lindell in such a way as to be responsive to the question he posed about legal restrictions but to avoid making a judgment about whether his signs were misleading. Paul took an approach that was intended to be conservative and consistent with a past decision of the Commission.

If a majority of Commission members would like us to handle similar requests for advice differently in the future (for example, by cautioning candidates seeking advice about a proposed action that the action might violate the Code of Fair Campaign Practices), we will follow that direction. Thank you.

2008 Election Year



RECEIVED

MAR 14 2008

MAINE ETHICS COMMISSION

COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Mail: 135 State House Station, Augusta, Maine 04333

Office: 242 State Street, Augusta, Maine

Website: www.maine.gov/ethics

Phone: 207-287-4179

Fax: 207-287-6775

2008 MAINE CODE OF FAIR CAMPAIGN PRACTICES (21-A M.R.S.A. § 1101(2))

I shall conduct my campaign and, to the extent reasonably possible, insist that my supporters conduct themselves, in a manner consistent with the best Maine and American traditions, discussing the issues and presenting my record and policies with sincerity and candor.

I shall uphold the right of every qualified voter to free and equal participation in the election process.

I shall not participate in and I shall condemn defamation of and other attacks on any opposing candidate or party that I do not believe to be truthful, provable and relevant to my campaign.

I shall not use or authorize and I shall condemn material relating to my campaign that falsifies, misrepresents or distorts the facts, including, but not limited to, malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate.

I shall not appeal to and I shall condemn appeals to prejudices based on race, creed, sex or national origin.

I shall not practice and I shall condemn practices that tend to corrupt or undermine the system of free election or that hamper or prevent the free expression of the will of the voters.

I shall promptly and publicly repudiate the support of any individual or group that resorts, on behalf of my candidacy or in opposition to that of an opponent, to methods in violation of the letter or spirit of this code.

I, the undersigned candidate for election to public office in the State of Maine, hereby voluntarily endorse, subscribe to and solemnly pledge to conduct my campaign in accordance with the above principles and practices.

Date

3/14/2008

Candidate's Signature

Office Sought and District

House District 41

Printed Name

R Kenneth Lindell

Wayne, Jonathan

From: Lavin, Paul
Sent: Wednesday, May 28, 2008 8:40 AM
To: Wayne, Jonathan
Subject: FW: former legislator using re-elect on campaign signs

From: Lavin, Paul
Sent: Tuesday, May 13, 2008 12:12 PM
To: 'R. Kenneth Lindell CEBS CFP(r)'
Subject: RE: former legislator using re-elect on campaign signs

Mr. Lindell,

The situation you've presented poses an interesting word usage question. However, we don't see that the use of the term "re-elect" on your campaign signs runs afoul of any law or rule within the Commission's jurisdiction. The only requirement regarding language that must be on campaign signs (or other campaign communications by or about candidates) is whether the communication was authorized by the candidate and the name and address of the person who financed the communication. There is also a prohibition against using an endorsement unless specifically authorized to do so. That's as far as Election Law goes regarding required or restricted language on campaign communications. There is no implied or express restriction in the law which limits the use of the term "re-elect" to incumbents only. Whether someone may find the term "re-elect" in the context of your current campaign misleading may be a possibility, but its use does not violate any law or rule found in Maine's Election Laws. If you have any questions, please let me know.

Paul Lavin
 Assistant Director
 Maine Ethics Commission
 242 State Street
 135 State House Station
 Augusta, Maine 04333-0135
 207-287-3024
 Paul.Lavin@maine.gov

From: R. Kenneth Lindell CEBS CFP(r) [mailto:ken@rkindell.com]
Sent: Tuesday, May 13, 2008 10:23 AM
To: Lavin, Paul
Subject: former legislator using re-elect on campaign signs

Hi Paul –

My name is Kenneth Lindell. I served as a member of the 122nd legislature, representing house district 41. I am running for re-election to that office (or so I thought). I have put out some old campaign signs using the term "re-elect", and got a call from a local newspaper editor saying somebody has complained the my use of the term is "misleading".

The purpose of my e-mail to you is to inquire whether it is the opinion of the commission that this is misleading? Also, is there any rule or statute restricting the use of the term "re-elect" to sitting incumbents?

Regards,

Ken Lindell

R. Kenneth Lindell, CEBS, CFP®

6/20/2008

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Belfast, ME 04915
tel 207-338-3223
fax 207-338-1182

Securities offered through Intervest International Equities Corp, Broker/Dealer Member FINRA/SIPC
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1980 Dominion Way Suite 202 Colorado Springs, CO 80918 +1 (800) 933-9299

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6/20/2008



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: 2008 Candidates in House District 41, and Senate Districts 34 and 35
Daniel Dunkle, Editor, The Republican Journal

From: Jonathan Wayne, Executive Director

Date: June 13, 2008

Re: Use of the Term Re-Elect in Campaign Communications

This is to inform you that the Maine Commission on Governmental Ethics and Election Practices will be considering at its next monthly meeting the question of whether candidates who are running for an office that they do not currently hold should use signs or other campaign materials with the term "re-elect." The Commission will view the question as it relates to primary and general elections. The Commission may consider whether the use of the term "re-elect" by a non-incumbent is inconsistent with the code of fair campaign practices, to which some 2008 candidates have subscribed.

You are welcome to comment or to provide the Ethics Commission with any information you believe is relevant by attending the meeting or by submitting materials in writing. The meeting will begin at 9:00 a.m. on Friday, June 27, and will be held in the Public Utilities Commission hearing room at 242 State Street in Augusta. Any materials that I receive on or before Thursday, June 19, I will include in a packet of materials mailed to the Commission members one week before the meeting. My e-mail address is Jonathan.Wayne@maine.gov.

There will be several items on the agenda, and this matter may be considered some time after 9:00 a.m. If you are thinking about attending the meeting and would like a better estimate of when the Commission will consider this matter, please contact the Commission staff at 287-4179. Also, if you have any questions, please telephone me at that number. Thank you.

OFFICE LOCATED AT: 242 STATE STREET, AUGUSTA, MAINE
WEBSITE: WWW.MAINE.GOV/ETHICS

PHONE: (207) 287-4179

FAX: (207) 287-6775



Friday, June 20, 2008

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State offers advice on Lindell's signs

Question raised about use of term 're-elect'

(Created: Wednesday, May 14, 2008 10:18 AM EDT)

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FRANKFORT — House District 41 Candidate R. Kenneth Lindell defended his use of the term 're-elect' in his campaign signs this week despite the fact that he is not the sitting incumbent.

"I am comfortable that my use of 're-elect' doesn't break the word or spirit of any election laws," Lindell wrote in an e-mail Tuesday after he contacted the Assistant Director of the Maine Commission on Government Ethics and Election Practices about his signs, which state, "Re-elect Lindell State Representative."

Lindell is running for the House District 41 seat that present state Rep. Lance Weddell, D-Frankfort, won two years ago. Weddell, who defeated Lindell for the seat in the last election, is not seeking re-election.

Maxwell Coolidge of Orland and Warren Dana Southworth of Searsport are vying with Lindell for the Republican nomination in the June 10 primary. The winner will go up against Democrat Veronica Magnan of Sandy Point in November.

Lindell responded to questions about the signs in an e-mail Tuesday.

"I was rather taken aback by your call," Lindell wrote. "It did not occur to me that someone would find re-elect on my signs to be misleading. I have been elected to the office that I am seeking once before, and I am now seeking re-election. I am not claiming to be the incumbent. I have made the fact that I have legislative experience representing House District 41 a key factor in my campaign. I don't think it is inappropriate to highlight my experience by using the term re-elect."

He goes on to say, "Nevertheless, I concede that someone who is completely unfamiliar with local politics (and never reads your newspaper) might think that I am the incumbent. Therefore I have copied this e-mail to the Assistant Director of the Maine Commission on Government Ethics and Election Practices, and I have asked for his opinion on the matter. If he decides t



House District 41 Candidate R. Kenneth Lindell defended his use of the term 're-elect' in his campaign signs this week. **STEVE FULLER**

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I should not use the term re-elect, I will change my signage."

Later Tuesday, Lindell e-mailed a response from Paul Lavin, assistant director, Maine Ethics Commission, which states:

"The situation you've presented poses an interesting word usage question. However, we do see that the use of the term 're-elect' on your campaign signs runs afoul of any law or rule within the Commission's jurisdiction. The only requirement regarding language that must be on campaign signs (or other campaign communications by or about candidates) is whether the communication was authorized by the candidate and the name and address of the person who financed the communication. There is also a prohibition against using an endorsement unless specifically authorized to do so. That's as far as Election Law goes regarding required or restricted language on campaign communications. There is no implied or express restriction in the law, which limits the use of the term 're-elect' to incumbents only. Whether someone might find the term 're-elect' in the context of your current campaign misleading may be a possibility but its use does not violate any law or rule found in Maine's Election Laws. If you have any questions, please let me know."

Reader Messages

There are No comments posted.

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Subchapter 5: MAINE CODE OF FAIR CAMPAIGN PRACTICES HEADING: PL
1989, c. 802, §1 (new)

21-A §1101. Maine Code of Fair Campaign Practices

1. Distribution to candidates. At the time a candidate for the office of Governor, the Senate or the House of Representatives registers with the commission as required under section 1013-A, the commission shall give the candidate a form containing a copy of the Maine Code of Fair Campaign Practices established in this subchapter. The commission shall, at that time, inform the candidate that subscription to the code is voluntary. For the purposes of this subchapter, "code" means the Maine Code of Fair Campaign Practices.

[[PL 1989, c. 802, § 1 (NEW).].]

[1989, c. 802, §1 (NEW) .]

2. The code form. The code, printed on the form provided to candidates under subsection 1, must read as follows:

"Maine Code of Fair Campaign Practices

I shall conduct my campaign and, to the extent reasonably possible, insist that my supporters conduct themselves, in a manner consistent with the best Maine and American traditions, discussing the issues and presenting my record and policies with sincerity and candor. I shall uphold the right of every qualified voter to free and equal participation in the election process. I shall not participate in and I shall condemn defamation of and other attacks on any opposing candidate or party that I do not believe to be truthful, provable and relevant to my campaign. I shall not use or authorize and I shall condemn material relating to my campaign that falsifies, misrepresents or distorts the facts, including, but not limited to, malicious or unfounded accusations creating or exploiting doubts as to the morality, patriotism or motivations of any party or candidate. I shall not appeal to and I shall condemn appeals to prejudices based on race, creed, sex or national origin. I shall not practice and I shall condemn practices that tend to corrupt or undermine the system of free election or that hamper or prevent the free expression of the will of the voters. I shall promptly and publicly repudiate the support of any individual or group that resorts, on behalf of my candidacy or in opposition to that of an opponent, to methods in violation of the letter or spirit of this code. I, the undersigned, candidate for election to public office in the State of Maine, hereby voluntarily endorse, subscribe to and solemnly pledge to conduct my campaign in accordance with the above principles and practices.

Candidate for Public Office"

[[PL 1989, c. 802, § 1 (NEW).].]

[1989, c. 802, §1 (NEW) .]

SECTION HISTORY

1989, c. 802, §1 (NEW). 1989, c. 802, §1 (NEW).

21-A §1102. Printing of code forms

The commission shall print, or cause to be printed, copies of the code for distribution to registered candidates. [1989, c. 802, §1 (NEW).]

SECTION HISTORY

1989, c. 802, §1 (NEW).

21-A §1103. Acceptance of completed forms

The commission shall accept, at all times prior to the election, completed code forms that are properly subscribed to by a candidate. [1989, c. 802, §1 (NEW).]

SECTION HISTORY

1989, c. 802, §1 (NEW).

21-A §1104. Public records

The commission shall retain for public inspection all completed code forms accepted by the commission under section 1103. A code subscribed to by a candidate is a public record under Title 1, section 408. [1989, c. 802, §1 (NEW).]

SECTION HISTORY

1989, c. 802, §1 (NEW).

21-A §1105. Subscription to code voluntary

In no event may a candidate be required to subscribe to or endorse the code. [1989, c. 802, §1 (NEW).]

SECTION HISTORY

1989, c. 802, §1 (NEW).

Subchapter 5: MAINE CODE OF FAIR CAMPAIGN PRACTICES HEADING: PL
1989, c. 802, §1 (new)

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